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No. 520

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 104–106) dismissing appellants' suit to set aside a Report and Order of the Interstate Commerce Commission (J.S. App. 76–103) which authorized the Permian Basin Railroad Company (PBRR) to construct and operate a new railroad line in Texas.

On February 21, 1963, the PBRR applied for such

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authority under Section 1(18)–(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)–(20). Upon protests by the appellants, a full hearing was held before an examiner, and he recommended denial of the application (J.S. App. 1–75). The PBRR filed exceptions, and the Commission, three members dissenting, rejected the hearing examiner's recommendation and granted the application. From its careful examination of the evidence in the record concerning estimated revenue from carriage of various commodities, the Commission concluded that in its first year of operation the PBRR would have net operating revenues of $600,000, and net income of $50,000 (J.S. App. 85–89). In any event, the new railroad would attract new industry, generate new traffic, and generally "foster further development of the tributary area" (J.S. App. 93). Shippers and receivers in the area would derive great advantages from the new line, and the protesting carriers would not suffer any material adverse effect (J.S. App. 90). The Commission concluded that construction of the new railroad was required by the present and future public convenience and necessity.

The court below affirmed, holding that the Commission's findings were supported by substantial evidence and that its estimates as to future profitability were sufficiently precise and specific. The court also held that, in any event, the Commission's order was justified by the great need for construction of the new line, "balanced against only a minimal threat of hardship" to appellants, irrespective of profitability (J.S. App. 105.)

ARGUMENT

This Court has repeatedly made clear that the Interstate Commerce Commission "possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service." *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88; *United States* v. *Detroit & Cleveland Nav. Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. In a growing economy service must be made available that is adequate to meet the needs of tomorrow as well as today. "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade* v. *United States,* 314 U.S. 534, 546.

There is no basis for appellants' claim that the Commission applied an "unprecedented laissez faire doctrine" and "abdicated * * * its statutory duty" to protect the public and investors (J.S. 17–24). Rather, the Commission's conclusion is supported amply by its findings that a need exists for the proposed facilities, that they would be profitable, and that the appellants would not suffer any material adverse effects from their establishment. These findings were properly upheld by the district court as supported by substantial evidence considering the record as a whole (J.S. App. 104–105). There is no need for a further examination of the record by this Court. *Illinois C. R. Co.* v. *Norfolk & W. R. Co.,* 385 U.S. 57, 65–69; *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 490–491.

Appellants' principal contention, that the Commission did not give sufficient consideration to the future profitability of the new railroad (J.S. 17), is without substance. The Commission carefully considered the sharply divergent revenue and cost estimates of the parties and then made its own determination that net income during the first year of operations would be some $50,000 (J.S. App. 86–89).[1] Recognizing that the Commission's estimate of profitability was necessarily a prediction of future events, the court below correctly held that it was sufficient (J.S. App. 105). "An intelligent estimate of probable future values * * *, and even indeed of present ones is at best an approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin

[1] Appellants' assertion that at least "a $250,000 annual deficit will be incurred if Permian Basin is financed as its incorporators propose" (J.S. 17) is based on a prematurely assumed $300,000 annual debt service expense. This expense is purely speculative, since, as the Commission pointed out, the feasibility and fairness of PBRR's plans to finance the railroad remain to be considered in a subsequent proceeding under Section 20a of the Interstate Commerce Act (49 U.S.C. 20a) when PBRR applies for authorization to issue securities. At that time "the Commission might conclude that [PBRR] should be financed entirely by the sale of common stock or by stocks and contingent income bonds" (J.S. App. 93). Certainly it was not improper for the Commission to postpone until the financing proceeding the question of how much debt capital PBRR should be allowed. See *Federal Power Commission* v. *Tennessee Gas Co.*, 371 U.S. 145.

of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U.S. 290, 310. Appellants demand a predictive certainty which is simply unattainable. See *Erie-Lackawanna R.R. Co.* v. *United States,* 279 F. Supp. 316, 343 (S.D.N.Y.), affirmed *sub nom. Penn-Central Merger Cases,* 389 U.S. 486.

The Commission not only found that the PBRR would operate at a profit; it also weighed the possibility of losses. It found that even if the new railroad did suffer some initial losses, it would bring great advantages to its service area and would stimulate future economic growth and development (J.S. App. 89–92). In this context, the Commission properly concluded that "[w]ithin reasonable limits, residents of the area involved should be permitted to assume the risks" of constructing a railroad. *Construction of Line by Wenatchee Southern Ry. Co.,* 90 I.C.C. 237, 255–256; cf. *Penn-Central Merger Cases,* 389 U.S. 486, 510. Administrative discretion to evaluate the public convenience and necessity should not be fettered by a rigid requirement that immediate profits be guaranteed before new facilities can be provided to the public.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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